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IN THE

SUPREME COURT OF THE UNITED STATES

No. 775

JOHN W. MARTIN, As Trustee of the Property of
FLORIDA EAST COAST RAILWAY COMPANY.
Petitioner,

vs.

MAYNARD R. TINDELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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MAYNARD R. TINDELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

John W. Martin, as Trustee of the Florida East Coast Railway Company, a Florida corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled action on November 13, 1957.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported in 98 So. 2d 483 (Advance Opinion). A copy of the opinion is set out in Appendix B of this petition and a copy of the judgment in Appendix C.

JURISDICTION.

The judgment of the Supreme Court of Florida was entered on November 13, 1957. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether or not Petitioner was entitled to a directed verdict.

2. Whether or not the following instruction to the jury given *sua sponte* by the trial judge was erroneous:

> "You were instructed to that effect and also you were instructed to this effect: That the plaintiff occupies a different status from anybody else on that train because he was employed to work there and it was the duty of the railroad company to provide a safe place for him to work and you were instructed to that effect."
>
> "It was his duty to work there and it was the duty of the railroad company to provide him a safe place to work."

3. Whether or not the trial court erred in twice denying the railroad's motions to appoint medical specialists to examine Tindell and evaluate his injuries.

4. Whether or not the medical testimony was legally sufficient to establish a causal relationship between Tindell's accident in January, 1953, and his heart attack in September, 1953, and, if not, whether the verdict was excessive.

STATUTES INVOLVED.

Federal Employers Liability Act.
Title 45, United States Code, Section 51.
Title 45, United States Code, Section 53.
The full text of these sections is set out in Appendix A.

STATEMENT.

Maynard Tindell was employed by the trustee of the Florida East Coast Railway Company as a traveling mechanic. His job was to ride on certain of petitioner's trains, make inspections of mechanical equipment, make such mechanical repairs as he could while en route and report any defects he observed (R. 25, 31, 33, 34).

On January 20, 1953, Tindell was injured when he slipped and fell in the tavern car Lake Okeechobee which was part of one of petitioner's northbound trains.

Another traveling mechanic had reported an overhead leak in the air conditioning equipment on the Lake Okeechobee on January 16, 1953, as the car came into Miami, Florida (R. 26). Repairs were made on the car and the air conditioning unit tested (R. 210-211), but the leak was again reported when the car was on a northbound run on January 17, 1953.

The Lake Okeechobee went to New York and was next on petitioner's lines on January 19, 1953. Maynard Tindell was the traveling mechanic on the train and reported an overhead leak in the car (R. 216). Inspection and repairs were again made in petitioner's yards and the unit was tested and operated properly (R. 217) at that time.

On January 20, 1953, the car was part of petitioner's northbound train, the Champion. When it arrived at the Miami Terminal for loading, the bartender in the car noticed water leaking in the overhead grill and told the stationmaster about it. Nothing was done to repair it prior to the time the train left (R. 43-44).

Tindell was again the traveling mechanic on the train. He noticed the leak when the train was somewhere between Fort Lauderdale and Delray Beach, Florida (R. 192). He turned the compressor off in order to prevent more condensation from the air conditioner but left the fan on (R. 193). He and the bartender put papers on the floor in the area where the water was (R. 192-193).

The train continued north, stopping at Delray Beach, Lake Worth and West Palm Beach (R. 193). When the train was just north of West Palm Beach, Tindell called the conductor, told him about the leak and advised him to wire ahead to New Smyrna Beach to have the car cut out of the train because it was dangerous (R. 193-194).[1] The conductor said he would.

At that time, the papers had been removed from the floor but the floor was still wet (R. 194). Immediately thereafter, the conductor left through one door of the car and Tindell walked right onto the wet floor, slipped in the water and fell (R. 194). After the accident, other railroad employees put more paper down on the floor and also obtained sand.

Tindell lived in St. Augustine, Florida, and was taken to a hospital there, operated by the East Coast Hospital Association. The Association was financed primarily by

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[1]West Palm Beach is located at petitioner's milepost 299 and New Smyrna Beach at petitioner's milepost 125 (R. 220), Jacksonville being milepost 0 and Miami milepost 366.

the contributions of its member railroad employees (R. 265), but operational deficits were made up by the railroad (R. 294). He remained there for 18 days, underwent further convalescence at home for a back injury and in May, 1953, was released to light work although still not fully recovered.

On September 1, 1953, some eight months after the accident, Tindell had a heart attack which was diagnosed as a coronary thrombosis. He sued petitioner in the state court in Miami, Florida, under the Federal Employers Liability Act.

Twice prior to the trial of the case, petitioner moved to have the trial court appoint an orthopedic specialist and a heart specialist to determine the nature and extent of the injuries allegedly sustained by Tindell (R. 4, 6). Upon opposition from respondent, the motion was twice denied (R. 5, 7).

At the trial, Tindell called an orthopedic specialist (R. 227), a specialist in neurology (R. 152) and a heart specialist (R. 101, 104), all from Miami, to testify. All had examined Tindell just before the trial (R. 106, 156, 257). He introduced testimony to show that his fall in January and his heart attack in September were causally related. He also read the testimony of a general practitioner in St. Augustine who treated the heart cases at the East Coast Hospital (R. 91-99), but who did not give an opinion as to the cause of Tindell's heart attack.

Petitioner called a doctor from St. Augustine who had treated Tindell in the hospital there. This doctor was the chief surgeon for the railroad, chief surgeon for the East Coast Hospital Association and had been Tindell's personal physician for many years (R. 265).

The doctor was attacked by respondent as to his qualifications, his bias and even as to his ethics (R. 295-299) and was generally painted as a backwoods practitioner.

His testimony conflicted with that of the Miami medical specialists as to the severity of Tindell's back injury and the cause of his heart attack. The doctor thought Tindell would have had the heart attack regardless of the accident (R. 293). He stated that Tindell expressed anxiety to him in the months following the accident not over his back injury but over disappointment in not getting a promotion he thought he was entitled to. Tindell had written him a letter about this with a request that he forward it to the railroad officials (R. 292). The doctor testified that from what Tindell told him this had caused any anxiety he had rather than his back injury.

At the trial, Tindell relied on the testimony of the heart specialist by whom he had been examined for purposes of trial to prove a causal relationship between the injury and subsequent heart attack. The doctor, basing his conclusions on the history Tindell had related to him, attributed Tindell's heart condition to worry brought on by the back injury (R. 141). He admitted that if there were two sources of anxiety or worry either one alone would be enough to "precipitate" a heart attack (R. 145-146) and he could not say that either one was the cause.

Tindell himself did not testify about any anxiety or the cause of it. The medical history given by Tindell to each doctor stands uncontradicted.

After the jury had retired, they returned to the courtroom without having arrived at a verdict (R. 372) and asked about the comparative negligence doctrine which applies to cases brought under the Federal Employers Lia-

bility Act. The trial judge gave further instructions on this point and then instructed the jury:

> "You were instructed to that effect and also you were instructed to this effect: That the plaintiff occupies a different status from anybody else on that train because he was employed to work there and it was the duty of the railroad company to provide a safe place for him to work and you were instructed to that effect."
>
> "It was his duty to work there and it was the duty of the railroad company to provide him a safe place to work." (R. 373-374).

The questions presented in this petition were raised and preserved in the following manner:

1. Question One by motions for directed verdict made at the close of plaintiff's case and at the close of all the evidence (R. 195-196, 364) (motions denied R. 196, 364), by motion to set aside verdict and for entry of final judgment for defendant or for new trial (R. 380) (motion denied R. 383) and by assignments of error in perfecting appeal (R. 386) (Judgment affirmed by Florida Supreme Court—Appendix C).

2. Question Two by exceptions to charges (R. 372), by motion for new trial (R. 382) (motion denied R. 383), by assignments of error in perfecting appeal (R. 388) and by Section 59.07, Florida Statutes (Judgment affirmed by Florida Supreme Court—Appendix C).

3. Question Three by motions for compulsory physical examination (R. 4-5, 6) (motions denied, R. 5-6, 7), by motion for new trial (R. 382) (motion denied R. 383) and by assignments of error in perfecting appeal (R. 389) (Judgment affirmed by Florida Supreme Court—Appendix C).

4. Question Four by request to charge (R. 379), exceptions to denial thereof (R. 372), by motion for new trial (R. 380-381) (motion denied R. 383) and by assignments of error in perfecting appeal (R. 386-387) (Judgment affirmed by Florida Supreme Court—Appendix C).

ARGUMENT.

We urge this court to grant a writ of certiorari to review the judgment of the Supreme Court of Florida as to the following matters:

Point One: Whether or not the Petitioner was entitled to a directed verdict.

This court has repeatedly reaffirmed the statement that the Federal Employers Liability Act is based upon negligence. To recover under the act, an employee must show that the railroad was negligent and that such negligence was the proximate cause in whole or in part of the accident. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 32; *Carter* v. *Atlanta & St. A. B. R Co.*, 338 U. S. 430, 435.

In the present case, there was absolutely no evidence of causation between the alleged negligence and the injuries Tindell received. Nor was there any showing of a duty owed to Tindell and a subsequent breach of that duty. The decision in the present case is inconsistent with and contrary to the following decisions regarding causation in actions brought under the Federal Employers Liability Act:

1. *Gill* v. *Pennsylvania R. Co.*, (3rd Cir. 1953) 201 F. 2d 718, certiorari denied 346 U. S. 816. Judgment for plaintiff was reversed where employee's action in straightening up in box car resulted in injuries to him even assuming negligence on the part of the railroad in ordering an

employee with a leg disability to work in a cramped area. There was no causal relationship.

2. *Reynolds* v. *Atlantic Coast Line R. Co.*, (5th Cir. 1952) 196 F. 2d 643, companion case affirmed 336 U. S. 207. Summary judgment for defendant railroad affirmed where alleged negligence in allowing tall canes to grow close to tracks forced plaintiff to cross from one car to another to pass signals and he was killed in so doing. No causal relationship between the alleged negligence and the accident.

The present decision is also inconsistent with and contrary to the following cases, all brought under the Federal Employers Liability Act, holding that an employee whose duty it is to inspect or repair an alleged defect cannot complain when injured as a result of his failure to inspect or repair it.

1. *Barnett* v. *Terminal Railroad Assoc. of St. Louis*, (8th Cir. 1956) 228 F. 2d 756, certiorari denied 351 U. S. 953. Directed verdict for defendant railroad affirmed where plaintiff, a car inspector and repairman, was injured by an air hose it was his duty to repair. The court said:

> "This mechanism, it may be said, was in bad repair when he went on duty and it was his job, and his alone, to make the necessary repairs. There is no claim that during the time he was making the repairs the defendant failed to furnish him with proper tools or failed to furnish him with a reasonably safe place to make the repairs or actively did anything that resulted in his injuries. A mechanic could not, we think, be heard to complain that it was the negligence of his employer that caused the mechanism to get out of repair. It might be said that there would be no occasion for the mechanic to perform any duty if the mechanism were not out of repair. By analogy we may consider the case of an automobile mechanic. The owner of a car

through his own negligence has had a collision resulting in damage to the car. The mechanic is called to repair it. If injured in so doing he certainly could not attribute the original negligence of the owner of the car as the proximate cause of his injury. So in the instant case, if there was any negligence on behalf of the defendant in failing to connect up the hose in controversy earlier than it did that would not be the proximate cause but would simply furnish the opportunity for the infliction of injuries."

2. *Labonte* v. *New York, N. H. & H. R. Co.*, (1956) 333 Mass. 420, 131 N. E. 2d 203, certiorari denied 351 U. S. 974. Directed verdict for defendant railroad affirmed where plaintiff, a section gang foreman, was injured when he stepped into a depression. It was his duty to have it taken care of but he had not bothered with it.

3. *Payne* v. *Baltimore & Ohio R. Co.*, (1953) 351 Ill. App. 186, 114 N. E. 2d 323. Judgment n. o. v. for defendant railroad affirmed. Plaintiff, a section laborer, was injured when he slipped in some slag he was spreading as ballast. The fact that the ballast along the side of the track may have been uneven did not create liability because the very reason for plaintiff's employment there was to make it even.

See also, *Wadiak* v. *Illinois Cent. R. Co.*, (7th Cir. 1953) 208 F. 2d 925; *Byars* v. *Moore-McCormack Lines*, (2d Cir. 1946) 155 F. 2d 587; *McGivern* v. *Northern Pacific Ry. Co.*, (8th Cir. 1942) 132 F. 2d 213; 56 Corpus Juris Secundum, 1005, Master and Servant, § 250; 35 American Jurisprudence 615, Master and Servant, § 187.

In the present case, Tindell was working as a traveling mechanic. His duties were to make such mechanical repairs as he could while the train was on the line (R. 25, 31, 33, 34).

While making inspection he discovered the overhead water leak. He made certain adjustments in the air conditioning unit in an attempt to lessen the amount of water leaking down (R. 193). He put paper down on the floor and mopped some of the water up.

Later he called the conductor, pointed out the leak and the water on the floor, told him it was dangerous and that the car should be cut out of the train at New Smyrna Beach the next inspection point (R. 215). The conductor agreed to wire ahead from Fort Pierce, the next division point. Then Tindell did exactly what he had told the conductor was dangerous—he walked into the water and fell.

Although the floor was still wet and slippery (R. 193-194) Tindell did nothing more to minimize the danger. The papers previously put down had been removed and were not replaced (R. 194). After Tindell's accident, other employees put more paper on the floor and obtained sand and gravel and spread it on the wet area (R. 204). Tindell had not done so prior to the accident.

The case factually falls in the mainstream of the decisions cited. Tindell was on the train for one purpose only —as traveling mechanic. If it was not his duty to repair and make safe, whether temporarily or permanently such defects as the overhead leak and the water on the floor, he was superfluous.

The Supreme Court of Florida in its opinion recognized the principle of law we claim is controlling but said:

> "If the plaintiff had been a mechanic hired to make repairs in the shop of defendant, he might not be able to complain of his injury since the correction of the defective unit would require that he work under the conditions created by the faulty mechanism. But the plaintiff was a traveling mechanic * * *."

This, we submit, is a distinction without a difference. It was Tindell's job and no one else's to make running repairs whether temporary or permanent, of defective equipment. He failed to do so here and instead went and did what he told the conductor it was dangerous to do and thereby caused the accident.

The judgment of the Florida Supreme Court is in conflict with the federal and state decisions cited and, we feel, merits the review of this court.

Point Two: Whether or not the following instruction to the jury given sua sponte by the trial judge was erroneous:

> **"You were instructed to that effect and also you were instructed to this effect: That the plaintiff occupies a different status from anybody else on that train because he was employed to work there and it was the duty of the railroad company to provide a safe place for him to work and you were instructed to that effect."**
>
> **"It was his duty to work there and it was the duty of the railroad company to provide him a safe place to work,"** (R. 388).

After three days of trial, after hearing final arguments and the charge of the court, the jury retired at 6:42 p. m. (R. 372). At 9:00 p. m. they returned to the courtroom and announced they had not arrived at a verdict (R. 372).

In a colloquy between one of the jurors and the trial judge, it became clear that some of the jurors misunderstood the court's earlier charge on comparative negligence (R. 372-373). The trial judge gave additional instructions to the jury on this point and then gave the charge complained of.

It is clear that the charge was erroneous in that it substituted for the standard of reasonable care an absolute duty on the part of the railroad. *Yazoo and Mississippi Valley R. Co.* v. *Mullins*, 249 U. S. 531; *Baltimore & Ohio, S. W. R. Co.* v. *Carroll*, 280 U. S. 491; *Atlantic Coast Line R. Co.* v. *Dixon*, (5th Cir. 1951) 189 F. 2d 525, certiorari denied 342 U. S. 830.

In its opinion, the Florida Supreme Court recognizes that the charge was erroneous but says it was not prejudicial under the circumstances. It bases its conclusion on two grounds.

First, it says that the anonymous juror who asked the court about the comparative negligence doctrine said "Everyone agreed that they had no disagreement in the fact of thinking that the railroad had some responsibility in regards to the boy's accident." (R. 372) and therefore the jury had already found against the railroad on the issue of liability. Second, it says that the jury was earlier instructed that the standard was one of reasonable care and not absolute.

It is elementary that a verdict is final only when it is published. The act of inquiring whether the jury had arrived at a verdict did not amount to receiving a verdict. *Small* v. *Pennsylvania R. Co.*, (D. C. Cir. 1935) 80 F. 2d 704, certiorari denied 297 U. S. 724. *A fortiori*, the statement of one juror made at a time when the jury admittedly had not arrived at a verdict (R. 372) and was confused as to the applicability of comparative negligence and the duty of care required of Tindell cannot be considered as an announcement of a jury finding.

Having been confused as to whether Tindell had any responsibility at all for his own safety, the jury might well have reconsidered its entire approach to the case after the trial court's reinstructions. It is not for us to say nor is it for the Florida Supreme Court.

As to the second ground relied upon, the earlier instructions (R. 367, 371) as to the standard of care were, we believe, correct. In his reinstruction, however, the trial judge nullified his earlier charge by stating

> "* * * and also you WERE instructed to this effect: that the plaintiff occupies a different status from anybody else on that train because he was employed to work there and it was the duty of the railroad company to provide a safe place for him to work, and you WERE instructed to that effect." (R. 373) (Emphasis supplied).

The earlier instruction was supplanted by a later, erroneous one and the jury instructed that the earlier charge had been to the same effect. The jury had not arrived at a verdict at the time. Yet the trial court gave an instruction to go back and apply an incorrect proposition of law in arriving at a verdict under the comparative negligence doctrine. It was error; it was prejudicial. The verdict in this case—$125,000.00—is evidence of it.

This court has repeatedly based its review of lower court decisions in actions under the Federal Employers Liability Act on the ground that the function of the jury may have been interfered with by the courts. We feel that this case merits the review of this court as to what is clearly an erroneous charge for the same reason.

Point Three: Whether or not the lower court erred in twice denying the railroad's motions to appoint medical specialists to examine Tindell and evaluate his injuries.

After the accident on January 20, 1953, Tindell was taken to the East Coast Hospital in St. Augustine, Florida. The hospital, run by the East Coast Hospital Association, was financed primarily by the contributions of member railroad employees but its deficits were made up by the railroad (R. 294).

Dr. V. A. Lockwood, the head of the hospital association, was also the Chief Surgeon for the railroad. He had been Tindell's family doctor for some 20 years (R. 265). He treated Tindell for his back after the accident.

Tindell remained in the hospital for 18 days and then went home for further convalescence. There was no neurologist or neurosurgeon in the hospital and so Tindell was sent to a neurologist in Jacksonville, Florida, for examination and evaluation of his back injury (R. 268). This was in June, 1953 (R. 302). The neurologist referred him to a neurosurgeon in Miami (R. 302). The final diagnosis was that of back strain and not of herniated intervertebral disc (R. 310). Neither specialist had seen Tindell for more than a year before the trial.

Tindell had returned to light work following his back injury, but in September, 1953, almost nine months after the accident, suffered a heart attack and had not been back to work since. He was treated for his heart condition by Dr. Lockwood and also by a Dr. A. C. Walkup, a general practitioner in St. Augustine, who had handled heart cases in the hospital there for two years (R. 91-92).

The medical questions at the trial were, therefore (1) the nature and degree of Tindell's admitted back injury—was it a sprain or a herniated disc (2) whether or not there was any relationship between Tindell's fall in January, 1953, and his heart attack in September, 1953.

Feeling that these were questions for medical specialists, petitioner moved to have an orthopedic specialist and a heart specialist examine Tindell (R. 4-5).[1] The motion

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[1]Under the Florida Rules of Civil Procedure, Rule 1.29 providing for compulsory physical examination, is similar to Rule 35, Federal Rules of Civil Procedure.

was denied without prejudice to renewing it (R. 5) and, when renewed, was again denied (R. 6-7), both times upon opposition from Tindell.

Prior to the trial, Tindell had consulted with and been examined by numerous other physicians (R. 8-9). At the trial, he called upon three of those to testify, an orthopedic surgeon (R. 227), a neurologist (R. 152) and a specialist in cardiology (R. 100-101). All were from Miami. They had seen Tindell in order to testify and not to treat. All had seen and examined him within a week or two of the trial (R. 106, 156, 257).

Petitioner called Dr. Lockwood as a witness at the trial. His opinions as to the nature of Tindell's back injury and the cause of his heart attack were in conflict with the opinions of Tindell's specialists.

On cross examination, the doctor was attacked as to his bias (R. 293-295) ethics (R. 291-292) and qualifications (R. 298-299). He was painted as a small time general surgeon with "a general knowledge" (R. 299), not entitled to any weight as against those of Tindell's experts.

In its opinion, the Florida Supreme Court states that such motions for physical examination are usually granted as a matter of course and that "in the usual situation where a plaintiff is treated by his personal physician in a private hospital so that the defendant does not have access to the reports of either the hospital or the physician such a motion might be sufficient and a denial thereof an abuse of discretion".

The Florida Supreme Court then says that because petitioner had access to the records of the hospital and to the reports of its physicians it "could have obtained from these records and physicians the information which would have

been revealed by a compulsory physical examination." It concludes that for this reason there was no error.

The hard facts are these: Tindell, a resident of St. Augustine, injured near West Palm Beach and then taken to St. Augustine for treatment, took advantage of a liberal venue statute to sue in Miami.[1] On his own initiative or at the instance of his attorneys, he consulted a number of Miami doctors (R. 8-9). He chose three to testify at the trial. All were specialists; their backgrounds were impressive.

When petitioner moved to have the court name two specialists to examine Tindell and evaluate his back and heart complaints—a motion the Florida Supreme Court states is usually granted as a matter of course and the denial of which would ordinarily be error—the motions were denied.

The family doctor to whom Tindell had gone for treatment for 20 years and to whom he went for treatment after the accident was attacked as biased and unqualified. Although the same doctor had sent Tindell to both a neurologist and a neuro-surgeon for examination and evaluation not long after the accident, petitioner was denied the opinions of similar specialists at the trial, and compelled to try the case on the *ex parte* testimony of Tindell's hand-picked experts.

If, as the Florida Supreme Court says, the denial of a motion for a compulsory physical examination of a

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[1]Inasmuch as actions under the Federal Employers Liability Act are not removable from state to federal courts, railroads are not afforded the protection from "forum shopping" that are granted other litigants by virtue of ability to remove to federal court and then move for transfer under 28 United States Code 1404 (a).

plaintiff where permanent injuries are claimed is ordinarily error, this is certainly an *a fortiori* situation.

Tindell chose as a forum the largest city in the state, went to medical specialists there and called them as witnesses to bolster his theory of the case. He resisted petitioner's motions for court-appointed physicians—then attacked the medical background and qualifications of the upstate physician who had been his family doctor for 20 years.

If there was no abuse of discretion here—where the medical questions were not whether Tindell had a back ailment and a heart ailment but the degree of the one and the causal relationship of the other—there is no such thing.

We urge the court to grant review as to this point.

Point Four. Whether or not the medical testimony was legally sufficient to establish a causal relationship between Tindell's accident in January, 1953, and his heart attack in September, 1953, and if not whether the verdict was excessive.

Tindell sought to establish that his back injury in January and his heart attack the following September were causally related in order to support his allegation that he had been totally disabled as a result of the accident. It is clear that the back injury, while possibly causing some disability was not permanently disabling. Tindell had in fact returned to work in May, 1953, some four months before he had the heart attack (R. 188).

His proof consisted of the testimony of Dr. Burtner, a Miami heart specialist. Dr. Burtner had seen Tindell on two occasions, both within two weeks of the trial (R. 106). He, of course, relied on the history given him by Tindell in arriving at a medical opinion (R. 145).

The history as given by Tindell was one of worry and anxiety following the accident (R. 111-112). The doctor stated that Tindell's fat, pyknic (R. 121) build and blood cholesterol content made him more likely than the average for a heart attack (R. 141-143, 149). He stated that in his opinion the accident followed by an anxiety state "precipitated" the heart attack (R. 140).

Dr. Lockwood, who had been Tindell's family doctor for 20 years and had treated him for both his back and his heart condition (R. 266), stated that from the history Tindell gave him and from his observations Tindell showed no unusual anxiety over his back and was actually improving and getting better until he developed a resentment over his failure to obtain a promotion to which he thought he was entitled (R. 287-288). Tindell expressed no undue concern to the doctor about his back (R. 288) but a great deal of concern over the lack of promotion (R. 287) and actually wrote a letter about it asking the doctor to forward it to the officials of the railroad (R. 291-292, 275).

Tindell, although called as a witness, did not testify about his physical condition. All the testimony about Tindell's physical and mental condition during the period following his back injury and prior to his heart attack came then from the two doctors, each testifying about what Tindell had told him.

On cross examination, Dr. Burtner, the witness upon whom Tindell relied to establish causation said that extreme anxiey over a loss of promotion (R. 145) or over any matter (R. 145) could "precipitate" a heart attack, that if there were two or more concurrent sources of anxiety he could not attribute the heart attack to one and not to the other (R. 145-146). He stated that his opinion as expressed was based on what Tindell had told him--before

the accident he was getting along all right, after the accident he was nervous (R. 146-147). *Post hoc, propter hoc.*

There were, then, two versions as to the cause of any anxiety Tindell may have had in the months following his accident. There was the history Tindell gave Dr. Lockwood and the history he later gave Dr. Burtner. The history given Dr. Lockwood was corroborated in part by the letter Tindell wrote (Defendant's Exhibit F, R. 292). Tindell himself neither confirmed nor denied either of the medical histories. Both versions thus stand uncontradicted. The specialist Tindell called to prove a causal relationship between the accident and the heart attack said that if there were another source of anxiety he could not say that one or the other "precipitated" the heart attack.

The evidence on this all-important point was, then, not a case of conflicting opinions from which a jury could choose but a case where the only witness upon whom Tindell relied to prove a causal relationship could not choose between two causes both of which stand uncontradicted in the record.

In its opinion the Florida Supreme Court admitted that the verdict in this case would be excessive if considered as an award for Tindell's back injury alone. In other words, but for the testimony of Dr. Burtner, Tindell's medical expert, it would have reversed for excessiveness. This point involves a question of proof required in actions under the Federal Employers Liability Act and, we feel, merits the review of this court.

CONCLUSION.

Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX A

Federal Employers Liability Act

48 United States Code
Sections 51 and 53

Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth

shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 53. Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1957

JOHN W. MARTIN, as Trustee of the Property of Florida East Coast Railway Company,
Appellant,
vs.
MAYNARD R. TINDELL,
Appellee.
} CASE No. 28,093

Opinion filed November 13, 1957

An Appeal from the Circuit Court for Dade County, George E. Holt, Judge

Anderson, Scott, McCarthy & Preston and Dwight Sullivan and Russell E. Frink, for Appellant

Nichols, Gaither, Green, Frates & Beckham, for Appellee

On Rehearing Granted

O'CONNELL, J.

Maynard R. Tindell, appellee here, was plaintiff below. John W. Martin, as Trustee of the property of the Florida East Coast Railway Company, the appellant here, was the defendant below. The parties will be referred to as they stood in the trial court.

Plaintiff brought an action for personal injuries under the Federal Employers Liability Act, 45 USC 51 et seq. On a jury trial a verdict in amount of $125,000 was rendered for plaintiff. A motion for new trial was denied, final judgment was entered and this appeal taken therefrom.

Plaintiff was a traveling mechanic for the defendant railroad. As such it was his duty to make light repairs to the cars while the train was underway.

On several occasions prior to January 20, 1953, the day of the accident to plaintiff, it had been reported to the defendant that water was leaking from an air conditioning unit in the tavern car, Lake Okeechobee, in which the plaintiff sustained his injury. Although the defendant worked on the car in the railroad yard on two occasions, the cause of the leak was not discovered prior to the injury to plaintiff. There was evidence that on the day of the accident the trainmaster was advised by the bartender assigned to the tavern car that the air conditioning unit was leaking and that the car should be "cut out", but that despite this warning the car was sent out on the train when it left Miami going North.

While the train was proceeding North, the plaintiff attempted to repair the unit so as to stop the leak which was spilling water onto the floor of the tavern car. Finding that he could not stop the leak, plaintiff notified the Conductor and advised that the car be taken out of the train because of the dangerous condition created by the water on the floor. Immediately thereafter he walked on the wet floor, slipped and fell, sustaining a back injury.

Plaintiff was treated for the back injury at the East Coast Hospital Association at St. Augustine, Florida. He was also referred to other physicians by the doctors of the hospital. Plaintiff returned to work on May 1, 1953, at the same rate of pay but at lighter work.

On September 1, 1953, plaintiff suffered a coronary thrombosis. He was also treated for this condition at the East Coast Hospital Association. He contends that the accident caused not only the back injury but the heart condition as well.

Plaintiff filed this suit in October, 1953. It was tried in October, 1954.

The defendant complains that the trial court committed error in refusing to grant defendant's motions for compulsory physical examination of the plaintiff.

Under Florida C. L. Rule 28, now Rule 1.29, 1954 Florida Rules of Civil Procedure, it is obvious that the granting of an order for physical examination is at the discretion of the trial judge. The rule reads that the court "may" order the examination and provides that "the order may be made only upon good cause shown . . . ."

In the two motions before us the grounds or cause shown was "to determine the exact nature and extent of the injuries alleged to have been sustained by plaintiff as a result of the negligence of the defendant." The defendant did not state that it did not have this information.

We realize that motions for compulsory physical examinations in personal injury actions are usually granted as a matter of course by trial judges, and that it is the common practice of attorneys to file a perfunctory motion such as was filed here. In the usual situation where a plaintiff is treated by his personal physician in a private hospital so that the defendant does not have access to the reports of either the hospital or the physician such a motion might be sufficient and a denial thereof be an abuse of discretion.

But in the case before us we find that the plaintiff was treated for his back injury and his heart condition in the East Coast Hospital Association, a non-profit hospital supported mainly by railroad employees' contributions with any deficit being made up by the defendant railroad. There is no question but what the defendant had access to the

hospital records and to the reports of the physicians of the hospital, and could have obtained from these records and physicians the information which would have been revealed by a compulsory physical examination. It appears that the hospital physicians were required to and did submit medical reports to the defendant's legal staff. The chief surgeon for the defendant was the plaintiff's family physician and treated the plaintiff for both his back injury and in part for his heart condition, the last treatment which he had rendered to the plaintiff being approximately two weeks prior to the trial.

The defendant complains that it was prejudiced by the court's refusal to order the compulsory physical examination because the plaintiff's attorneys at the trial attacked the physicians who testified for the defendant as not being qualified specialists.

We realize that it is of some importance in a jury trial to have a specialist testify, yet the question before us is did the trial judge abuse his discretion in denying the motions for compulsory physical examination.

Under the facts in this case we are of the opinion that the trial judge did not abuse his discretion in denying the motions for compulsory physical examination.

Defendant next contends that the plaintiff's negligence in stepping on the wet floor which he knew to be, and which he had warned the conductor to be, dangerous was the sole proximate cause of his injury, and that, therefore plaintiff cannot recover, and a directed verdict should have been given in defendant's favor. Under this contention defendant also argues that the plaintiff cannot recover because of the unsafe condition since it was his duty to repair and correct it.

The facts of this case clearly show that the plaintiff was negligent. Yet we cannot say that the absence of negligence on the part of the defendant was so clear as to justify the trial court directing a verdict for the defendant.

The facts of this case show that the faulty condition of the air conditioner and the resulting leaking of water on the floor of the car had been reported to the defendant on at least four occasions in the six day period prior to and including the day of the accident. The evidence shows that the cause of the flooding was a clogged drain pipe underneath the car. It could not have been repaired while the train was making its run.

If the plaintiff had been a mechanic hired to make repairs in the shop of defendant, he might not be able to complain of his injury since the correction of the defective unit would require that he work under the conditions created by the faulty mechanism. But the plaintiff was a traveling mechanic. Defendant in its brief states that his duties were to ride on certain of defendant's trains, make inspections of mechanical equipment, make such repairs as he could while the train was en route and report any defects he observed. The condition which caused his injury was not a result of his failure to correct a condition which he could have remedied, but rather came about because of the defendant's use of a tavern car which it had been repeatedly warned had a faulty air conditioning unit therein which leaked water onto the floor creating an unsafe condition.

Had the defendant not been warned of the defective unit and resulting unsafe condition of the floor in the car prior to its being used on the day of the accident, or had the leak developed for the first time on the occasion of plaintiff's injury then the liability of the defendant might well be different.

We think a jury might well determine from the facts of this case that the defendant was negligent in using the tavern car on the day of plaintiff's accident and therefore that it was not error to refuse the directed verdict for defendant.

The Federal Employers' Liability Act, 45 USC Section 51 et seq., has stricken the defenses of contributory negligence and assumption of risk. Comparative negligence has been substituted therefor. *Boat Dagny* v. *Todd*, 224 F. 2nd 208 (First Cir. 1955) and *Martin* v. *Riley*, 226 F. 2nd 612 (Fifth Cir. 1956). The negligence of the plaintiff therefore does not prevent his recovery if the defendant was also guilty of negligence.

We have carefully examined and compared the many cases, cited by counsel for defendant in their able briefs, on the question of negligence of an employee precluding recovery and the cases holding that an employee whose duty is to make repairs cannot complain that the employer is negligent for allowing a mechanism to get out of repair. We do not find such cases to be applicable here, for as abovestated contributory negligence on the part of the employee does not bar recovery. Further, in the case at bar the jury could have found the defendant guilty of negligence not for allowing the air conditioning unit to become defective, but rather for using the tavern car knowing that it was unsafe.

Therefore viewing the evidence including all inferences fairly deducible therefrom, in the light most favorable to plaintiff, as we are required to do, we conclude that the trial judge did not commit error in denying defendant's motion for directed verdict.

Defendant next contends that the trial judge committed clear error in a charge given the jury. After the

jury had retired to consider its verdict, it returned to the court room and asked for further instructions. The following transpired:

". . . . . .

"(1) THE COURT: Do you have a question to ask the Court?

"(2) THE JUROR: There was some contention over the fact—Everyone agreed they had no disagreement in the fact of thinking that the railroad had some responsibility in regards to the boy's accident, but it was also considered by, I will say at least one, that there was some understanding that the boy was to a certain extent responsible for the accident, and there is the contention, I believe—

"(3) THE COURT: I think that has been answered by the instruction already given you. If you have found the railroad to be NEGLIGENT, as you say you have found, and also find that the plaintiff has been contributorily negligent, and under the law of comparative negligence it is your duty to do this: First you determine the amount of damages you would award for the NEGLIGENCE of the defendant. That is one figure. Then you determine in your own minds how much you should take off of that figure for the contributory negligence of the plaintiff, and then bring in a verdict for the balance.

"(4) THE JUROR: Judge, if I may be permitted—I accept the responsibility. That was what I tried to be considering but I got no—I mean I was the only one. I thought it should be considered.

"(5) THE COURT: Well, that is your prerogative.

"(6) THE JUROR: That there was some responsibility, your Honor, to the boy, being an employee. The contention that it was—that part of the

responsibility of the accident that happened was his responsibility, and I tried to explain that we were instructed to that effect"

"(7) THE COURT: You were instructed to that effect and also you were instructed to this effect: That the plaintiff occupies a different status from anybody else on that train because he was employed to work there and it was the duty of the railroad company to provide a safe place for him to work, and you were instructed to that effect.

"(8) THE JUROR: Were our instructions so as not to regard this boy as being in anywise negligent as he was an employee of the railroad which was his duty to work for a railroad?

"(9) THE COURT: It was his duty to work there and it was the duty of the railroad company to provide him a safe place to work.

"(10) THE JUROR: Regardless of him?

"(11) THE COURT: No. If he is contributorily negligent, if you find from some act of his that he was contributorily negligent, you must subtract whatever amount you think he is responsible for from the full amount that you would award otherwise and bring in a verdict for the balance.

. . . . ."

The defendant complains that the statement made by the trial judge in the foregoing exchange, items (7) and (9), are clear error since they indicate that the defendant railroad had an absolute duty to provide a safe place for plaintiff to work, while the law only requires that the defendant exercise reasonable care to provide a safe place for its employees to work. There can be no dispute that this is the law. *Yazoo and Mississippi Valley R. Co.* v. *Mullins*, 249 U. S. 531 (1919); *Baltimore & Ohio S. W. R.*

Co. v. *Carroll*, 280 U. S. 491 (1930); *A. C. L.* v. *Dixon*, 189 F. 2nd 525 (Fifth Cir. 1951).

It is well settled that in passing upon a single instruction or charge it should be considered in connection with all the other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the giving of such instructions or charge must fail, unless under all the peculiar circumstances of the case the court is of the opinion that such instructions or charge were calculated to confuse, mislead or prejudice the jury. *A. C. L. R. Co.* v. *Crosby*, 53 Fla. 400, 43 So. 318 (1907). Further this Court in *Skinner* v. *Ochiltree*, 148 Fla. 705, 5 So. 2nd 605 (1941) said on the same subject "if the instructions assigned as error, considered in the light of the entire charge given, is reasonably free from error, then the charge as given will be sustained."

Standing alone the above referred to statements of the trial judge, items (7) and (9), are error but when considered in connection with the other charges given by the court, and particularly when read in connection with all of the discussion had between the trial judge and the juror on the jury's return for further instructions we have concluded that the statements were not prejudicial error such as would infect the minds of the jury so as to cause it to use an improper yardstick by which to measure the duty and negligence of the defendant.

From a careful reading of the discussion between the trial judge and the juror as above set forth it appears that the jury had already agreed that the defendant was negligent for the juror said in his first question:

> "Everyone agreed that they had no disagreement in the fact of thinking that the railroad had some responsibility in regards the boy's accident . . . ."

From the juror's questions it appears that the matter troubling him, and in which he was apparently in conflict with the remainder of the jury, was the question of comparative negligence. The trial judge seems to have properly clarified that question by his statements.

In addition to the foregoing it appears from the record that the trial judge, in the charges given at the request of both the plaintiff and defendant, on several occasions properly charged the jury that the defendant was required to use only *reasonable care in furnishing the plaintiff a safe place to work,* not to furnish him a safe place to work.

We are of the opinion that when considered in the light of the circumstances under which they were made and considered with all the charges given the statements complained of were not reversible error.

Finally, the defendant contends that the evidence connecting the fall and back injury with the subsequent heart condition suffered by the plaintiff is so conjectural and speculative that as not to be sufficient to sustain a finding that the heart condition was related to the accident suffered by the plaintiff. Defendant then logically reasons that if the accident is not causally related to the heart condition the verdict is excessive since $125,000 would be too great an award for the back injury alone.

We are inclined to agree that on the record in this cause the verdict would be excessive for the back injury alone. Therefore we must determine whether there was sufficient competent evidence upon which the jury could have found that the back injury was causally related to the heart condition.

Defendant calls to our attention that the plaintiff did not testify about the pain, worry, anxiety and nervous-

ness which are asserted to have followed his back injury and precipitated the heart attack. Yet through the testimony of the heart specialist who testified on behalf of the plaintiff there is sufficient evidence in the record concerning the worry, pain, anxiety and nervousness following the accident to reasonably support the conclusions given by this specialist that the fall and back injury produced conditions which precipitated the heart attack.

It is true that the doctor who treated the plaintiff for both his back and heart, and who testified for the defendant, indicated that the plaintiff's anxiety or nervousness stemmed from plaintiff's failure to get a promotion, while the plaintiff's specialist in detailing the plaintiff's case history stated that it was caused by the back injury. This presented a conflict which the jury had the right to and did resolve. We cannot say, on the evidence in the record, that they were wrong.

It follows that we must reject defendant's last contention, as we have the others made by it.

This cause has been ably argued before this Court on three occasions. It has received thorough consideration by this Court, and after such we have concluded that the judgment appealed from should be and is hereby

AFFIRMED.

TERRELL, C.J., HOBSON and THORNAL, JJ., and CRAWFORD, Circuit Judge, concur

DREW and BARNS, JJ., dissent

BARNS, J., Dissenting.

"I am constrained to dissent to Courts' conclusion, as expressed by it in the opinion by Mr. Justice O'Connell, holding, in effect, that the plaintiff's declarations made to

physicians employed as prospective expert witnesses to be substantive evidence of the truth of the matter so declared.

The basis in law for such dissent is that the Court has seemingly overlooked and failed to follow the hearsay rule of the law of evidence which rule of law, as stated by Wigmore, is as follows:

• • • "It is here sufficient to note that the Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination." 5 Wigmore on Evidence, page 3 (3rd Ed.)

"Under the name of the Hearsay rule, then, will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it." 5 Wigmore on Evidence, page 9 (3rd Ed.)

• • • "What we are here concerned with is a different notion, namely, that when a specific person, not as yet in court, is reported to have made assertions about a fact, that person must be called to the stand, or his assertion will not be taken as evidence." 5 Wigmore on Evidence, page 10 (3rd Ed.)

The trial of the case commenced on October 26, 1954. Mr. Tindell was "examined" by plaintiff's witness, Dr. O. Whitmore Burtner, a specialist in internal medicine, on October 15 and 19, 1954, and he was also "examined" by plaintiff's witness, Dr. Paul S. Jarrett, a specialist in psychiatry and neurology, on October 6 and 19, 1954. Both of these doctors, plaintiff's witnesses, testified that they found Tindell in an "anxiety-tension state." It is not

shown that he went to either doctor for treatment or that either doctor undertook to treat him as their patient. No other witnesses testified on behalf of the plaintiff as to his physical condition or as to the cause of his heart condition, and the defendant's expert witnesses testified that, in their opinion the fall did not cause his heart condition.

The plaintiff-appellee testified but gave no testimony as to his physical or mental condition at any time and the only matter concerning the plaintiff's mental or physical condition between the fall in January and the heart attack in September, 1953 on behalf of the plaintiff is the narration by plaintiff's experts, principally Dr. Burtner, of the declarations made to them by the plaintiff in October, 1954 shortly before the trial commenced.

The law seems to favor the admissibility of declarations made to a physician by a patient as to his subjective symptoms as trustworthy even as to the truth of the statements, but to apply the hearsay rule and to exclude such statements when made to a physician employed as a prospective expert witness as untrustworthy. However if admitted under the latter circumstances then they are not substantive evidence of the truth of matters declared to the physician but are received only as related to the opinion evidence and not for the purpose of establishing the truth of matters narrated to the physician as a history of the case.

Plaintiff's witness, Dr. Burtner, testified at length wherein he narrated the "history of the case" as it had been related to him by Tindell and as he had observed from the hospital records; his narration by Tindell's extra-judicial statements were extensive. Thereafter, on direct examination, the doctor, basing his opinion on his examination of Tindell and the "history" of the case pre-

viously narrated by him as obtained from Tindell and other sources, testified that the coronary thrombosis had been caused because of Tindell's emotional condition that had developed between the fall in January and the heart attack in September of the previous year, and that the antecedent emotional state termed by the doctor as "anxiety-tension state" was the "trigger mechanism" that caused the thrombosis.

The substance of Dr. Burtner's testimony was as follows:

"Q. With respect to the accident which he had back in January of 1953 and the coronary attack or the heart attack which he had in September of 1953, what in your opinion is the connection, if any, between the accident which he had and the symptoms that you have described in the history, and the heart attack which he had in September?

A. As a result of the accident, he developed a rather severe anxiety tension state, with these symptoms I have outlined; the principal ones being nervousness, the feeling of weakness, the feeling of being under a lot of tension and strain.

We call that one of the most important trigger mechanisms. That is a mechanism that has to do with the origin of a heart attack, his tension and strain from some cause, such as nervous tension.

No one knows the exact mechanism. We know that if you are under nervous tension and strain your peripheral blood vessels may constrict a little bit. It is felt that sometimes if you are under a lot of nervous tension and strain the coronary arteries may actually dilate a little bit, that being Nature's way of getting more blood to the heart, but it has been found as a general observation over and over again that people who are under nervous tension and strain have a great propensity to develop coronary thrombosis because of the fact that anxiety and nervous tension, if it is over

a long enough period and if it is severe enough, may very well act as the trigger mechanism that will cause the spasm of the coronary vessel in some one location, and by causing a spasm perhaps let a clot develop there and then let the thing go on from there.

Q. In your opinion did this accident and the injury to the back and the pain and the anxiety tension that developed from the accident, was that the trigger mechanism in your opinion in this case which triggered the heart condition of Mr. Tindell?

A. In my opinion, it is. I am very much impressed with that relationship. There is no way of actually proving it. We do know that people who are under a lot of nervous tension and strain are very apt to have this sort of thing happen.

A great deal depends on susceptibility. Were there any other factors there that might have made this man more susceptible and therefore might have made this trigger mechanism—given it a greater chance to operate.

I think perhaps there might be a few factors that I ought to mention briefly. Because of the fact that we do know that if you are of a short stature, pyknic build, broad shouldered, you are more apt to be susceptible to coronary thrombosis than if you are tall and slender.

This is just a general statement and it may not have much to do with this case. If you are a little overweight, that is one thing stressed these days from the statistics that have been compiled. Overweight predisposes a great deal to the development of a coronary occlusion, that is to say, of a coronary thrombosis.

An elevation of the blood cholesterol is worthy of more than passing interest. We are hearing a lot about it. There is a great deal of work being done, and yet we know if we take all the people who have a blood cholesterol of 334 milligrams per cent, we would find that the majority of them don't live out quite the normal life span and some of them perhaps less than normal life span.

These things that I have mentioned may have some bearing. I think the important thing too is that anxiety over a long period of time in considerable degree is often the trigger.

We find that so frequently in professional people, because they are the ones who are especially susceptible to coronary thrombosis. I am thinking especially of my own profession."

* * * * *

"Q. (By Mr. Beckham) Doctor, just one final question, sir. I want to be sure that we have no mistake. In the interest of saving time I just say this: Do I understand from your testimony that it is your opinion that the accident, followed by the state of anxiety tension that you have described, was the precipitating factor that precipitated the heart attack which Mr. Tindell had in September, 1953?

A. Yes, I would put it this way: I would say that as a result of the accident this man developed an unusual amount of anxiety-tension state and that the anxiety-tension state, because it was so severe and lasted as long as it did, was the trigger mechanism in all probability as near as anyone can possibly tell of the actual coronary thrombosis and myocardial infarction. That is the important trigger mechanism. * * *"

Plaintiff-appellee's other expert witness, Dr. Paul S. Jarrett, a specialist in psychiatry and neurology, testified that Tindell at the time of examination was in an "anxiety-tension state" which was based on statements made to him by Tindell, his examination and the hospital records. Dr. Jarrett did not narrate much of the "history of the case" as given him by Tindell but did state some of the symptoms of Tindell, both subjective and objective. However, his testimony was mostly confined to his findings of Tindell's then physical condition and answering questions related to the science of medicine in the field in which he specialized, which included diseases of the heart only as related

to neurology. Dr. Jarrett testified that he believed the pain in the heart was the result of his back pain, but he did not testify that the coronary thrombosis was the result of the fall. Of the back pain as related to the thrombosis his testimony was:

* * *

"Q. What effect, if any, do you think it would have on the actual thrombosis and heart attack that he had: Is that included in what you mentioned?

A. If it lasts long enough and the circulation is decreased long enough to the heart, then a thrombosis occurs. Most people with back pain wouldn't have such attacks of heart pain, and these things come up when there is disease of the coronary arteries, but a lot of people who have disease of the coronary arteries don't have the heart pain, and it takes something acting upon coronary artery disease to produce the heart pain, and I believe that his back pain in this particular patient does trigger or set off the blood vessel condition which sets up the pain in his heart muscle."

* * *

"Q. Can worry from other causes, in your opinion, precipitate a heart attack?

A. Yes. You mean from other causes?

Q. Causes other than worry over a traumatic injury?

A. Yes."

* * *

"Q. In your practice, if you have a man with a heart condition, you don't diagnose for him do you, on the heart condition, except as it is related to your field?

A. I would treat him only in conjunction with some other physician who was handling the heart condition."

Declarations of Bodily Condition Made to Physician Consulted for Treatment

The opinion by Judge L. Hand in the case of Meaney v. United States, 112 F. 2d 538 (1940) seems to well state the law:

> "The insured's declarations seem to have been offered as a narrative of his past condition; so far as appears they were no part of the basis of the physician's opinion as to his condition; at least they were not offered as such. They were therefore hearsay, and moreover, they did not fall within the generally accepted exception in favor of spontaneous expressions of pain or the like. It is quite true that this exception includes narrative statements as well as mere ejaculations, and that it has been extended to a declaration of present symptoms told by a patient to a physician. * * * The utterances of a patient in the course of his examination, so far as they are spontaneous, may be merely ejaculatory—as when he emits a cry upon palpation—or they may be truly narrative; and it will often be impossible to distinguish rationally between the two; between an inarticulate cry, for example, and a statement such as: 'That hurts'. The warrant for the admission of both is the same: the lack of opportunity or motive for fabrication upon an unexpected occasion to which the declarant responds immediately, and without reflection. But most of what he tells will not ordinarily be of that kind at all; there may be, and there is in fact, good reason to receive it, but it is a very different reason. A man goes to his physician expecting to recount all that he feels, and often he has with some care searched his consciousness to be sure that he will leave out nothing. If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. That justification is not

necessary in the case of his spontaneous declarations, even when they are narrative; but it is necessary for those we are now considering. This, as we understand it, is the doctrine of Barber v. Merriam, 11 Allen, Mass., 322.

"The same reasoning applies with exactly the same force to a narrative of past symptoms, and so the Supreme Court of Massachusetts, declared obiter in Roosa v. Boston Loan Co., 132 Mass. 439. A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment. Thus, in spite of the dicta in Northern Pacific R. R. v. Urlin, supra (158 U. S. 271, 15 S. Ct. 840, 39 L. Ed. 977) and Boston & Albany R. R. v. O'Reilly, supra (158 U. S. 344, 15 S. Ct. 830, 39 L. Ed. 1006) that only declarations of present symptoms are competent, several federal courts have seemed not to take the distinction between declarations of present and past symptoms, provided, the patient is consulting the physician for treatment and Professor Wigmore appears to assent. Wigmore Sec. 1722. United States v. Tyrakowski, 7 Cir., 50 F. 2d 766, 771; United States v. Nickle, 8 Cir., 60 F. 2d 372, 374; United States v. Roberts, 10 Cir., 62 F. 2d 594, 596; United States v. Calvey, 3 Cir., 110 F. 2d 327, 330. * * *

"It is indeed always possible that a patient may not really consult his physician for treatment; the consultation may be colorable. The judge has power to prevent an abuse in such cases, and here as elsewhere, when the competency of evidence depends upon a question of fact, his conclusion is final. He must decide before admitting the declarations whether the patient was consulting the physician for treatment and for that alone. Unless he is so satisfied, he must exclude them, though it is true that if he admits them, the defendant may still argue that they are untrustworthy. * * *"

Declarations Made to Physicians Employed As Prospective Expert Witnesses

McCormick on Evidence, pages 565-566 seems to make a clear presentation of the law applicable to declarations made to physicians employed as prospective expert witnesses as follows:

> "Many courts draw a sharp line, evidently, between physicians consulted for treatment and those employed solely as prospective expert witnesses. As to the latter, they have been inclined to impose special restrictions which are set out below.
>
> "1. It has been held, probably by the majority of courts that have passed on the question, that descriptive statements of present pain or symptoms when made to a doctor employed only to testify do not qualify for admission as substantive evidence under the present exception to the hearsay rule for statements of bodily condition.
>
> "2. The rule prevails generally that expert witnesses may testify to the information upon which they have relied in reaching their conclusions, and in respect to medical witnesses this practice would permit the doctor to give a general account not only of facts observed, but of the 'history' including the patient's statements as to injury, past symptoms, and present feelings as of the time of the examination. When presented for this purpose, the statements are not evidence of the matters stated, and hence not hearsay, but are merely explanatory of the opinion, enabling the jury to weigh it in the light of its basis. Most courts make no distinction, in respect to using the 'history' as grounds of opinion between doctors who attended for treatment and those who examined the patient only to prepare themselves to testify. A few courts, however, have held or intimated that these latter experts may not recount what the patient has told them, even for the non-hearsay purpose of explaining the grounds of opinion.

"3. The minority group of courts which adopt this last restriction limit correspondingly the admissibility of the opinions of the expert who has been employed only to examine and testify. Such experts, they hold, are confined to giving opinions based solely upon the objective facts observed by them (or upon a hypothetical question), and are barred from giving an opinion based even in part upon 'subjective' facts, that is upon what the patient has said about the history of his injury or his suffering and symptoms. This runs counter to the practice of medical consultants in considering such histories in forming their professional conclusions upon which they act decisively every day, and counter also to the general rule as to medical testimony which admits conclusions so formed."

"The establishment of a causal connection between the fall and the thrombosis is doubtful even if the 'history of the case' as declared to Dr. Burtner is taken as established by competent evidence. However, there is no sworn evidence to support the 'history of the case' as to the declarations made by the plaintiff just before trial as narrated by Dr. Burtner and, to a lesser degree, by Dr. Jarrett. The opinions of the physicians that the coronary thrombosis was related to the fall is based on the plaintiff's declared history is not substantive evidence of the truth of the matter declared since it does not fall within any exception to the hearsay rule of evidence; hence there is no showing of causal connection between the fall and the coronary thrombosis.

For the foregoing reasons I would reverse."

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM A. D. 1958

WEDNESDAY, NOVEMBER 13, A. D. 1957

JOHN W. MARTIN, as Trustee of the Property of Florida East Coast Railway Company,
Appellant

-vs-

MAYNARD R. TINDELL,
Appellee

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant his costs by him in this behalf expended, herein taxed except the $12.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice O'CONNELL was this day ordered to be filed.
A true copy,

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court

(Seal of the Supreme Court of Florida)

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FILED
FEB 17 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 775

JOHN W. MARTIN, as Trustee of the Property of FLORIDA EAST COAST RAILWAY COMPANY,

Petitioner,

vs.

MAYNARD R. TINDELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM S. FRATES,
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Miami, Florida
Attorneys for Respondent.

IN THE

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No. 775

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Petitioner,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 98 So. 2d 483, and is copied in full in the Appendix of the Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

NOTE: All emphasis supplied.

QUESTIONS PRESENTED

Petitioner presents four questions:

1. Whether Petitioner was entitled to a directed verdict.

2. Whether the trial court's charges on a railroad's duty to provide a safe place to work were erroneous.

3. Whether, under Florida Common Law Rule 28, it was error to deny Petitioner's motion for a Court-appointed doctor.

4. Whether the verdict is excessive.

STATUTES INVOLVED.

45 U.S.C. Sec. 51 provides:

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce— between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the

death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign —commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

45 U.S.C. Sec. 53 provides:

"Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virture of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in

his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: **Provided,** That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Florida Common Law Rule 28 (a) (Present Rule of Civil Procedure 1.29 (a)) provides:

"(a) Order for Examination. In any action in which the mental or physical condition of a party, or injury to property is in controversy, the court in which the action is pending may, in advance of the trial, order such party to submit to a physical or mental examination by a physician or other such qualified expert or may order an examination of the property alleged to have been damaged or injured by the defendant or his agent, or of the party alleged to have caused the damage or injury. The order may be made only upon good cause shown and upon notice to the party to be examined and to all other parties and to all persons in whose custody such property may then be, and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made."

STATEMENT

On January 16, 1953, the Petitioner received notice that air conditioning unit on one of its tavern cars was leaking badly (R. 26, 52-53). When the Respondent was injured on January 20, 1953, the Petitioner, for five days, had used this car for carrying passengers and employees despite full knowledge of the fact that the leaky unit was flooding the passageway in the car with "torrents" of water (R. 42), making the only means of ingress and egress "slippery, wet and dangerous". (R. 38-39).

The undisputed evidence shows that the Petitioner's air conditioner had a drip pan and drain pipe which worked just like a wash bowl in a home. When working properly, the water would fall into the pan and drain through the pipe to the ground underneath the car. The end of the drain pipe in question was underneath the car and completely clogged up with rust and scale (R. 55, 180-181). Since the water could not drain out, it backed up and flooded the car (R. 55-56). Mr. Reedy, head of the Petitioner's Air Conditioning and Steam Heat Equipment Department at the time of the accident, testified the defect was so obvious that "any good air condition mechanic could have found it" while the car was in a repair shop where its undercarriage could be inspected (R. 60).

The Petitioner did not actually discover that a clogged drain pipe was causing the condition until two days after the accident (R. 55). Mr. Reedy testified that the accumulation of rust and scale in the pipe must have been there "30 days or longer" and that the air conditioners were inspected monthly (R. 56). Thus, it is apparent at the

outset that the Petitioner made at least one inspection of the unit and negligently failed to discover the defect.

Five days before the accident, the Petitioner's traveling mechanic filled out a form stating that while the car was being used, water was dripping from the unit to the floor of the car (R. 26-27). The next day another traveling mechanic filled out another form stating that the unit was "leaking water badly overhead." (R.35-36). He then wired ahead stating the car was slippery and should be cut out (R. 37-38). A short time later a passenger fell in the slippery aisle and the mechanic had the conductor send out a second wire saying the car was "slippery, wet and dangerous." (R. 38-39). Since this was a Saturday, the mechanic made a personal phone call in an effort to get the car cut out, but was told that the Petitioner "would take care of it Monday." (R. 39). On Monday, the defect was reported again (R. 52-53).

On Tuesday, the day of the accident, the bartender of the tavern car reported for work and upon seeing that "water was coming down out of the air conditioning units in torrents" (R. 42), reported to his supervisor that "the car wasn't in condition to go out." (R. 43). The bartender then reported the matter to the train master whereupon the following occurred:

"Q What did you tell him?
A I told him — he came and looked also and I told him the car should be cut out and he told me it wasn't any of my business.

Q He told you it wasn't any of your business?
A Yes.

Q Did the car go out?
A Yes." (R. 44)

During the five day period of reporting the defect, railroad mechanics "repaired" the unit on two occasions (R. 210, 211), but never discovered that the drain pipe was clogged up although "any good air condition mechanic could have found it." (R. 60)

The above facts show beyond question that the "slippery, wet and dangerous" condition of the car was created by the Petitioners negligence in inspecting the car, in attempting to repair it, and above all, in deliberately using the car with full knowledge of its dangerous and defective condition despite the protests of an employee on the morning of the accident that the car should be cut out. Consequently, the Petitioner concedes the fact of its negligence.

Respondent, Maynard Tindell, had worked for the Petitioner for twenty-three years (R. 186). At the time of the accident he was a traveling mechanic who rode on the trains, making such light repairs as could be made while the train was underway (R. 204). Upon discovering the leaky air conditioner, Tindell made an inspection and determined that the car could not be repaired while in service (R. 48, 207, 195, 358).

The leaky air conditioner had completely flooded the aisle of the tavern car (R. 40-41), and this aisle was the only means of ingress and egress in the car. The aisle was just big enough for a person to pass through and it was impossible to use the aisle without walking in the water (R. 40-41, 47, 65, 74). Since the leak could not be

fixed enroute, Tindell turned off the compressor (R. 193-194); told the bartender to keep mopping up the floor (R. 192); and he and the bartender put down all the newspapers that could be found on the train (R. 362). When the newspapers became soaked they were removed (R. 362).

Just prior to the accident, Tindell, with wrenches in his hand (R. 66), went to the conductor at the far end of the car and asked him to wire ahead and have the car cut out (R. 359). As Tindell was returning to the other end of the car via the slippery aisle which was the only way to pass through the car, the train rounded a curve, the swaying motion threw his feet out from under him on the slippery floor and he was injured (R. 66-67, 355-356).

Before the accident, Respondent was a healthy robust individual with no prior history of heart trouble or rheumatic fever (R. 119). At the age of 43, he had worked for the Petitioner almost 25 years without a single serious illness (R. 119, 186). Thus, on the day of the accident Respondent was a man in perfect health and in the prime of life.

When Respondent fell he landed on his back with his head striking a nearby radiator (R. 107). He was knocked unconscious (R. 67) and awakened with "terrific pain" in his head, back and legs (R. 67-70, 107). He was given hypodermic injections on the train which "didn't do any good" (R. 69) and was removed by stretcher to a waiting ambulance when the train reached Saint Augustine (R. 69-70).

Respondent was taken to the Petitioner's hospital at Saint Augustine where he remained for eighteen days.

Examinations revealed blood in the urine and a mild cerebral concussion (R. 108, 122). X-rays showed no fractured vertebra but plaintiff had constant headaches, and pains and numbness in his legs, shoulder blades, and the back of his neck (R. 108), resulting from a ruptured intervertebral disc in his low back area (R. 243).

After his eighteen days in the hospital, Respondent was sent home for "modified bed rest". (R. 109). For the first month Respondent stayed in bed most of the time and continued to have headaches and pains in his back, shoulder blades, and legs (R. 109). Respondent remained at home for a total of three months (R. 109). He developed a choking feeling in his throat, pain and pressure in his breast bone, nervousness, mental depression, dizziness, a ringing in his ears, and physical weakness and inability to sleep. (R. 110, 230-232) Dr. Burtner stated that Respondent's symptoms showed an "anxiety-tension state which was superadded or superimposed upon the pain in the back, pain in the neck, and head and legs." (R. 110) Dr. Burtner further stated that this was a condition over which Respondent had no control and was "a rather usual development" (R. 111) from injuries such as Respondent received in his fall.

Respondent returned to work on May 1, 1953, nearly four months after the accident, doing light work (R. 112). While at work, Respondent's pains and anxiety-tension state continued without a let up and his condition actually grew worse (R. 112). Finally, after four more months in this condition, plaintiff suffered an acute myocardial infarction due to a coronary thrombosis while reading at home in preparation for his Sunday school lesson (R. 113-114).

Respondent spent nineteen more days in the hospital and was then sent home to convalesce (R. 114). Before his case was tried, Respondent had suffered four more heart attacks and had been hospitalized four more times (R. 115-117).

As Dr. Burtner explained in detail, a coronary thrombosis occurs when the flow of blood through an artery is restricted. A constricting spasm of the artery shuts off the flow of blood; a clot may form; and heart tissue dies for lack of nourishment (R. 124-135). Among the factors which can cause the artery to constrict are pain, physical exhaustion and anxiety tension (R. 134, 165-167). Dr. Burtner testified that in his opinion there was a causal relation between the injuries sustained in the fall and the heart attacks (R. 141) and stated:

> "Q . . . Do I understand from your testimony that it is your opinion that the accident, followed by the state of anxiety-tension that you have described, was the precipitating factor that precipitated the heart attack which Mr. Tindell had in September, 1953?
>
> A Yes, I would put it this way: I would say that as a result of the accident this man developed an unusual amount of anxiety-tension state and that the anxiety-tension state, because it was so severe and lasted as long as it did, was the trigger mechanism in all probability as near as anyone can possibly tell of the actual coronary thrombosis and myocardial infarction. That is the important trigger mechanism.

Q So that, in your opinion then, there was a cause and effect relationship present between the two through the avenue you have described?

A Yes." (R. 140-141)

On the above facts, the jury returned a $125,000 verdict for Respondent. A final judgment entered thereon was affirmed by the Supreme Court of Florida.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this Petition should be denied for the following reasons:

1. The decision below is of no importance whatsoever beyond the facts of the particular case.

2. The Third Question concerning denial of a Court-appointed doctor presents no federal question. Florida interprets its rules of civil procedure as allowing such appointments in the discretion of the trial judge. The opinion below specifically holds that when the plaintiff is treated by defendant's doctors and defendant has full knowledge of the plaintiff's condition, a Court-appointed doctor can be denied within the trial judge's discretion. This holding is manifestly reasonable. The problem as to how Florida Common Law Rule 28 should be interpreted is one of Florida rather than Federal law and presents nothing for the Court to review. Petitioner never claimed below that any Federal law was involved as to Court-appointed doctors, and presents no Federal law as a basis for review in its Petition.

3. The Fourth Question, claiming the verdict is excessive, is nothing more than a request that this Court reweigh medical testimony which has already been evaluated by a Florida jury, trial judge, and Supreme Court. It is unnecessary to decide whether this Court has power to reweigh medical testimony as to excessiveness. No claim was made below that excessiveness was a Federal law question. Furthermore, it is obvious that the finding below is correct.

4. The Second Question concerning the duty of care under the FELA is admittedly one of Federal law. However, it was answered by the Florida Supreme Court precisely in accord with the Federal law as announced by this Tribunal. The opinion below expressly follows this Court's holding in YAZOO AND MISSISSIPPI VALLEY R. CO. v. MULLINS (1919), 249 U.S. 531, that the duty is merely to use reasonable care to provide a reasonably safe place to work. The jury below was repeatedly so charged (R. 366-368, 369-370, 371) and the opinion below does no more than hold that the charges on reinstruction could not have misled the jury (which had already found the Petitioner negligent) when the charges were considered as a whole. Moreover, the charge on reinstruction specifically incorporated by reference all the prior instructions stating ". . . it was the duty of the railroad company to provide a safe place for him to work, **and you were instructed to that effect.**" (R. 373)

5. The First Question claims an utter lack of evidence to support a finding that "fault of the employer played any part in the employee's injury." ROGERS v. MISSOURI PACIFIC RAILROAD CO., 352 U.S. 500 at 510. The uncontradicted record shows Petitioner was

negligent in using a slippery, wet and dangerous car for an extended period of time with actual knowledge of its condition.

There is no occasion for inquiry as to what the law would be if the defect causing injury were one that Respondent was specifically employed to correct. The uncontradicted record shows that Respondent was a travelling mechanic whose job was to make whatever light repairs were possible while the train was underway. The defect which caused the accident was a clogged pipe underneath the car. The defect could only be corrected in a repair yard when the car was out of service and could not have been remedied by Respondent. Cf. LOUISIANA & ARKANSAS RY. CO. v. JOHNSON (CA 5, 1954), 214 F. 2d 290, cert. den. 348 U.S. 875; BOAT DAGNY, INC. v. TODD (CA 1, 1955), 224 F. 2d 208.

CONCLUSION

It is respectfully submitted that the Petition should be denied.

WILLIAM S. FRATES

WALTER H. BECKHAM, JR.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing has this 14 day of FEBRUARY, 1958, been delivered to George F. Gilleland, Esq., 627 Ingraham Building, Miami, Florida, Attorney for Petitioner.